UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>NL INDUSTRIES, INC., et al.<br><br>Defendants,<br><br>and<br><br>CITY OF GRANITE CITY, ILLINOIS, et al.<br><br>Intervenor/Defendants. | ) | Civil Action No.<br>91 CV 00578-JLF |

**CITY OF GRANITE CITY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

## INTRODUCTION

The City of Granite City, Illinois ("City") moves for the entry of a temporary restraining order and preliminary injunction to prevent the United States Environmental Protection Agency ("U.S. EPA") from undertaking a massive soil removal program that would irreversibly damage the City, its infrastructure, and the health of its citizens.

For six years U.S. EPA has held the City hostage pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9601 *et seq.* Specifically, in evaluating the potential impact of a secondary lead smelter which formerly operated in the City, the Chicago office of U.S. EPA decided that removing surrounding residential soil containing in excess of 500 parts per million ("ppm") lead was an appropriate goal, a decision which potentially impacted in excess

of 1,000 residences. U.S. EPA's decisions have been arbitrary, capricious, and illegal. The City in this action directly challenges the federal government's right to proceed in the absence of a legally enforceable decision regarding the residential soil cleanup. Before U.S. EPA inflicts irreversible harm on the citizens of Granite City by continuing its piecemeal remediation of residential soil, the City requests that the Court fully and carefully review U.S. EPA's actions and grant it a preliminary injunction staying U.S. EPA's recently resumed residential cleanup.

**HARM TO THE CITY**

As the affidavits attached to this memorandum demonstrate, the City faces grave harm to its economic health, its municipal infrastructure, and the health of its citizens if the cleanup proceeds.

Regarding the City's economic health, the affidavit of Prof. Geoffrey Hewings (attached as Exhibit A) demonstrates that the City has been struggling over the last few decades to recover from the blight left by the migration of heavy industry out of the Midwest into other parts of the country. The City has responded by attempting to attract industry, foster commercial activity, and serve as a bedroom community to St. Louis. The cleanup proposed by U.S. EPA would detrimentally affect the City's commercial center and poison attitudes regarding its residences.

Furthermore, the affidavit of William Baudendistel (attached

as Exhibit B) demonstrates that the proposed cleanup is unreasonably impacting city traffic planning and construction. It has received roughly $1 million from outside entities to rebuild 16th Street, but has discovered that the cost will increase dramatically because its contractor will be required to partially implement U.S. EPA's cleanup while constructing the roadbed.

Needless to say, if the City believed the health of its citizens would in any way be improved by the remedy called for in U.S. EPA's Record of Decision, the previous two concerns would melt away. However, mindful that U.S. EPA's sister agency has performed the Madison County Exposure Study, a health study (attached as Exhibit C) specifically to determine whether the cleanup would effectively improve the health of its citizens and having received an emphatic "no" as the answer, the City has now learned that the cleanup has more probability of harming its citizens than protecting them. A recent study by Dr. Robert Bornschein (attached as Exhibit D) demonstrates that a soil cleanup would at best mislead the City's residents into believing their homes have been improved when problems remain, and at worst increase the very lead dust problem U.S. EPA claims the cleanup would solve.

The Bornschein study is particularly critical to a decision about proceeding with U.S. EPA's remedy since, rather than theorizing about hypothetical benefits as does U.S. EPA, it examines actual post-remediation conditions at the Site itself.

All the experts, including those from U.S. EPA, agree that interior house dust containing lead presents the greatest health risk to children. The lead in the dust typically comes from a number of sources: painted surfaces from which lead-containing particles are introduced into the household and then reduced to dust, airborne lead, surrounding soil, and hobbies using leaded materials. Houses where an U.S. EPA soil cleanup has occurred present an opportunity to separate out the impact of the potential sources. To measure the respective impacts, Dr. Bornschein sampled and analyzed interior house dust lead levels, as well as lead in potential sources, and found that the soil cleanup either failed to reduce the lead dust levels or increased them, probably due to increased lead levels in the ambient air resulting from U.S. EPA's activities. In the meantime, the central industrial site (which is still used for metals fabrication and remains unremediated) continues to release dust into the surrounding streets. Together with lead paint these sources continue to contaminate house dust. Dr. Bornschein's study underscores the results of ATSDR study, which found lead in paint to be the principal health threat.

The cleanup U.S. EPA has championed has not reduced the primary health threat in the smelter neighborhood. High levels of dust remain in the houses. Instead of beginning with the residential cleanup, a rational cleanup should originate from the site and proceed outward. It should address paint and take great care that activities do not worsen any alleged problem. Rather

than endure the certain harm it will suffer, the City requests the Court to enjoin U.S. EPA from proceeding with the residential cleanup.

**PROCEDURAL POSTURE**

On July 31, 1991, the United States of America commenced an action in this Court seeking in separate counts (a) enforcement of an administrative order (the "Order") issued on November 27th, 1990 pursuant to Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended, 42 U.S.C. 9606(a) by the United States Environmental Protection Agency ("U.S. EPA") regarding the performance of a cleanup at the NL Industries - Taracorp Superfund Site in Granite City, Illinois, and (b) entry of a judgment pursuant to CERCLA Section 107 requiring Defendants to reimburse the United States for response costs for work performed by U.S. EPA in conjunction with the Site. The United States in its complaint alleged that the Order was based on a Record of Decision issued on March 30, 1990. (Complaint at Par. 43.)

Following the commencement of this action, Defendants moved the Court to trifurcate the proceeding so that the Court could (a) review the remedy chosen by U.S. EPA, (b) determine the ordinary relief to which U.S. EPA may be entitled, and (c) finally consider whether penalties were appropriate for noncompliance with the Order. As Defendants noted to the Court during the course of their motion, their disagreement with U.S. EPA concerned the choice of the residential soil cleanup level.

Thus, immediate attention to that decision would best conserve the resources of the Court and the parties to this action.

The City intervened in this case to protect the interests of its citizens. The City and Defendants have contended in their five-year-long defense against this action that U.S. EPA's administrative record underlying the choice of residential soil cleanup levels does not support its decision -- simply stated, a facial review of the record indicates that U.S. EPA's choice of residential soil cleanup levels has no basis in law or fact. In 1994, the City sought to enjoin U.S. EPA from proceeding with the residential cleanup. In response, U.S. EPA agreed to address only a handful of houses where soil lead levels exceeded 1,000 ppm. The agency also reconfirmed its earlier commitment to reopen the administrative record and stated that it would not prevent Dr. Bornschein from conducting his study. Finally, the agency agreed to a convention among the parties' experts to determine whether a consensus solution was obtainable.

Unfortunately, U.S. EPA remains irrationally committed to a cleanup standard it cannot legally support. In September 1995, it reconfirmed the original soil cleanup levels, basing its decision on a flawed rationale. The rationale, simply stated, is that U.S. EPA's favorite guidance model, when run with default values, indicates a cleanup level at or near 500 ppm lead in soil. U.S. EPA's decision making remains fundamentally flawed.

U.S. EPA has recently remobilized its contractors to undertake piecemeal soil remediation in the City. Given the

imminent harm the City and its citizens will incur if the cleanup continues, the City seeks a preliminary injunction against further work.

## SUMMARY OF ARGUMENT

Three principal themes permeate U.S. EPA's administrative record in the present case:

- U.S. EPA reached its decision about a cleanup level first and sought to justify it later. In the year of its original Record of Decision (1990), U.S. EPA offered and then recanted on three successive sets of justification. The fourth, presented in its Decision Document, recanted on the original Record of Decision and for the reasons discussed below remains legally deficient. U.S. EPA's continued attempts to backfill its record, coupled with statements on and off the record that it had no intention of seriously considering any cleanup level above 500 ppm, demonstrates bad faith.

- U.S. EPA's exclusive reliance on a model that has not been subjected to the rulemaking procedures of the Administrative Procedure Act is an illegal shortcut to choosing an appropriate remedy. The cleanup level for lead in residential soil must be determined using site-specific factors and in a manner which considers all available evidence. The model's simplistic hypotheses are no substitute for actual data. Yet, when confronted with data that does not fit its model, U.S. EPA has discounted the data rather than discounting the model. U.S. EPA's narrow-visioned effort to support its simplistic model even if it fails to account for site data demonstrates bad faith.

- Whatever U.S. EPA may hypothesize, through its model or otherwise, about the effectiveness of the proposed soil cleanup, Dr. Bornschein's study demonstrates that U.S. EPA's remedy accomplishes nothing and may accelerate the amount of lead migrating into residences.

To obtain preliminary relief, the City must demonstrate that (1) it has a reasonable probability of success on the merits, (2) it will suffer irreparable harm, (3) the harm it may incur in the

absence of relief outweighs any harm its adversary might incur, and (4) granting the preliminary relief is in the public interest. These requirements are met in the present case. In light of U.S. EPA's flawed remedy selection process -- evidenced by its own administrative record -- the City will succeed on the merits. As discussed in the previous section, the City faces irreparable harm if the cleanup proceeds. Its citizens will not only fail to realize the health benefits U.S. EPA claims, they may also be lulled into a false sense of security that the problems caused by deteriorating lead-based paint have been mitigated by the soil removal. In addition to physical damage to its infrastructure, the City will incur significant economic hardship because of the remedy. With respect to balancing harms, U.S. EPA suffers no harm by conducting itself in an appropriate manner, and the public interest demands that it do so.

For these reasons, the City requests the Court to issue a preliminary injunction preventing U.S. EPA from proceeding with its residential soil cleanup.

## STATEMENT OF FACTS

### (a) Site Background and Investigation.

The Site, used from the turn of the century for the recovery of lead from metal-bearing materials, is located at the edge of an industrialized area in Granite City, Illinois. (March 30, 1990 Record of Decision ("ROD") at p. 1, AR No. 217). Residential portions of Granite City are located to the north of

the Site, and the Cities of Venice and Madison are located to the southwest and south respectively. During the Site remedial investigation, analyses of samples taken in residential areas surrounding the smelter[1] indicated that the soil contained lead in amounts above that present in normal soil. (Id. at 4). The issue in the present case is whether permitting soils, particularly those which have less than 1,000 ppm lead, to remain around the Site raises an environmental or health threat.

During the 1980's, U.S. EPA and NL Industries reached an agreement, embodied in an administrative consent order, under which NL Industries performed the Remedial Investigation ("RI") and the Feasibility Study ("FS") at the Site. (AR No. 5) Pursuant to the agreement, NL Industries submitted the required RI and FS reports to U.S. EPA. (AR Nos. 36, 37, 151, and 152). While there were several areas of disagreement between NL Industries and U.S. EPA over the final form of the reports, one is particularly relevant to the current discussion. In an effort to characterize the Site area and reach a decision about the appropriate cleanup level, NL Industries' contractor used accepted risk assessment procedure and reached the conclusion that a lead-soil level well above 1,000 ppm was an appropriate cleanup goal for the residential neighborhood. (AR No. 144). U.S. EPA disagreed and told NL Industries that it would (and later did) add a remedial alternative to the FS report containing a 500 ppm residential soil cleanup criterion. (AR No. 151).

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[1]The smelter has been closed since 1983.

When NL Industries disagreed with the agency's conclusion and requested U.S. EPA to utilize the dispute resolution procedures the parties had agreed to in the administrative order, U.S. EPA refused. (See AR No. 142).

(b) U.S. EPA's Proposed Plan.

On January 10, 1990, U.S. EPA issued a "Proposed Plan" for the Site, a document which informs the public of the remedy it has tentatively selected for a particular Superfund site, and initiated a comment period, originally scheduled to close on February 24, 1990.[2] (AR No. 153). The Proposed Plan chose the alternative remedy set forth in the FS Report Addendum, also issued on January 10, 1990, requiring cleanup of residential areas having soils with lead concentrations in excess of 500 ppm. Since the remedial investigation had not characterized these areas, the lots included in the alternative were not well defined. The Proposed Plan estimated the preferred remedy would cost about $25 million, and the FS Report estimated the cost of cleaning to 1,000 ppm in residential neighborhoods at about $7 million.[3]

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[2]The period was later extended to March 12, 1990. No notice of the extension was given to individual parties identified by U.S. EPA. As the record demonstrates, U.S. EPA failed to send notice of the comment period's commencement or the Proposed Plan to parties it had identified as potentially responsible for the cleanup. (Absence of such material in Administrative Record.) Instead, it claims it published a notice in Granite City area newspapers.

[3]U.S. EPA had stated at a December 1989 meeting that its alternate remedy would cost $13.9 million. However, NL Industries noted that U.S. EPA had erred in calculating the cost of the alternative, and the Proposed Plan estimated a cost of $25 million. By the time of the Record of Decision, the cost had risen to $28.5

The Proposed Plan (p.1) did state that it was intended by U.S. EPA as the vehicle to "present the rationale for identification of a preferred alternative for the site." However, in rejecting the alternative proposed by NL Industries for the site (Alternative D, which was nearly identical to the selected alternative with the exception of the residential soil cleanup level), the Proposed Plan merely stated:

> Alternative D would provide good long-term effectiveness with respect to materials consolidated with the Taracorp pile; however, at Areas 1, 2, and 3, lead concentrations at 3 inches beneath the ground surface would remain at levels which may present a risk to public health. The no action alternative allows waste materials to remain in place and, thus, has poor long-term effectiveness.

Nowhere in the Proposed Plan did U.S. EPA explain why 1,000 ppm lead in soil presented a health threat. However, U.S. EPA had stated in its Addendum to Draft Feasibility Study Report:

> EPA and Illinois EPA (the Agencies) do not believe that 1500 ppm in residential soils and 4800 ppm for industrial areas (as in Alternatives (C and D) [sic] and use of a predesignated non-analytically based excavation depth of 3 inches are protective of human health and the environment due to the direct contact with lead and potential leachability of lead to the ground water. The attached list of documents provides the basis for this determination and the determination that 500 ppm is an appropriate residential soil lead cleanup level at the NL Site. (AR No. 151).

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million. Despite this enormous increase in the cost of the remedy and the fact that the statute and the NCP require cost consideration, U.S. EPA never expressly addressed the remedy's cost-effectiveness, other than a conclusory statement that the remedy is cost-effective.

The agency did not otherwise explain how the listed documents supported its choice.[4]

The guidance U.S. EPA listed as supporting its decision is very short. The pertinent portion states:

> This guidance adopts the recommendation contained in the 1985 Centers for Disease control (CDC) statement on childhood lead poisoning and is to be followed when the current or predicted land use is residential. The CDC recommendation states that "... lead in soil and dust appears to be responsible for blood levels in children increasing above background levels when the concentration in the soil or dust exceeds 500 to 1000 ppm". Site-specific conditions may warrant the use of soil cleanup levels below the 500 ppm level or somewhat above the 1000 ppm level. The administrative record should include background documents on the toxicology of lead and information related to site-specific conditions.
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> The range of 500 to 1000 ppm refers to levels for total lead as measured by protocols developed by the Superfund Contract Laboratory Program. Issues have been raised concerning the role that the bioavailability of lead in various chemical forms and particle sizes should play in assessing the health risks posed by exposure to lead in soil. At this time, the Agency has not developed a position regarding the bioavailability issue and believes that additional information is needed to develop a position. This guidance may be revised as additional information becomes available regarding the bioavailability of lead in

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[4]The documents listed by U.S. EPA included its "Interim Guidance on Establishing Soil Lead Cleanup Levels at Superfund Sites" (an internal EPA guidance which has never been subjected to rulemaking procedures) (AR No. 95), a number of Records of Decision from other Superfund Sites (AR Nos. 137-141), and documents titled "Cincinnati Soil Lead Demonstration Project Work Plan" (AR No. 85), "Reducing Lead Uptake in Lettuce" (AR No. 144), "A Study of Soil Contamination and Plant Lead Uptake in Boston Gardens" (Id.), and "Lead in Soil: Recommended Maximum Permissible Levels" (Id.).

soil.

> Blood-lead testing should not be used as the sole criterion for evaluating the need for long-term remedial action at sites that do not already have an extensive, long-term blood-lead data base.

A footnote to the last paragraph states:

> In one case, a biokinetic uptake model developed by the office of Air Quality Planning and Standards was used for a site-specific risk assessment. This approach was reviewed and approved by Headquarters for use at the site, based on the adequacy of data (due to continuing CDC studies conducted over many years). These data included all children's blood-lead levels collected over a period of several years, as well as family socio-economic status, dietary conditions, conditions of homes and extensive environmental lead data, also collected over several years. This amount of data allowed the Agency to use the model without a need for extensive default values. Use of the model thus allowed a more precise calculation of the level of cleanup needed to reduce risk to children based on the amount of contamination from all other sources, and the effect of contamination levels on blood-lead levels of children.

(AR No. 95).

Various comments to the Proposed Plan (AR Nos. 187, 216) directly addressed the documents U.S. EPA had listed as underlying the rationale for choosing 500 ppm and demonstrated that:

- Documents related to garden vegetable uptake had no relationship to the soil cleanup level cited by EPA.
- The outdated document which suggested a 600 ppm cleanup level and on which U.S. EPA depended was riddled with obvious errors and had been discredited.

- The Cincinnati study work plan provided no basis for picking a particular soil cleanup level.
- Reliance on a guidance document, which on its face requires consideration of site-specific conditions, and on decision documents from other sites did not substantiate the 500 ppm cleanup level at the Granite City Site.
- U.S. EPA had misrepresented the cost of the cleanup at its December 18, 1989 meeting.
- The agency had relied on its lead guidance document in a manner which violates basic principles of administrative law.
- U.S. EPA had failed to provide adequate notice of the comment period and should extend it to provide for additional comments from the parties that would be asked to perform the cleanup.
- Nothing in the administrative record properly documented the step-by-step decision process followed by U.S. EPA in selecting the preferred remedy.
- The agency failed to consider the direct health impact of its preferred remedy.
- U.S. EPA improperly rejected NL Industries' risk assessment out of hand when it failed to provide a substantive alternate basis for setting risk at the site.

(c) U.S. EPA's Record of Decision and Responsiveness Summary

In its Record of Decision, U.S. EPA formally adopted the preferred alternative as set forth in the Proposed Plan, with the

addition of several tasks proposed in community comments which were, in U.S. EPA's view, unrelated to the soil cleanup issue. (AR No. 217). As required by statute, the Record of Decision contained a Responsiveness Summary, which together with the Record of Decision claims to set forth the basis for the decision to set a 500 ppm level for residential soil cleanup. The Responsiveness Summary specifically recanted U.S. EPA's reliance on other Records of Decision and the Cincinnati study work plan for selecting the soil cleanup level. Rather, U.S. EPA devoted Appendix B of the Record of Decision (attached as Exhibit E) to substantiate its choice of remedy.

Appendix B catalogued factors U.S. EPA claims to have considered in reaching its decision. Those factors which directly addressed the level of lead in soils included:

- The agency's own lead-in-soil guidance document, which calls for a level between 500 and 1,000 ppm.
- The Integrated Uptake/Biokinetic Model, application of which to the Site indicates that 500 ppm is safe.

According to U.S. EPA, a 500 ppm standard led to the conclusion that children in the area of the smelter would have a mean blood lead level of 8.37 ug/dl and that only 8.5% of the affected population would have a blood lead level above 15 ug/dl. This result was considered acceptable.

Also included in Appendix B were various factual assertions characterized as "considerations" that had "gone into" the clean-up level determination. Finally, Appendix B referenced a number

of lead studies not specific to the Site and an ex parte communication between U.S. EPA and one of the studies' authors.

**(d) Response to the Record of Decision.**

U.S. EPA followed its Record of Decision with a June 25, 1991 Special Notice Letter, a statutory device for initiating negotiations with parties U.S. EPA has identified as potentially responsible for cleanup. (Supp. AR No. 1). A number of common threads ran through the Defendants' responses to the Special Notice Letter:

- Defendants and other parties EPA had contacted offered to perform all aspects of the Scope of Work set forth in the Record of Decision, except for the widespread residential cleanup.
- The parties offered complete and specific documentation as to the reasons for their disagreement with U.S. EPA's Record of Decision and offered an alternative strategy for implementing the Record of Decision.
- The documentation demonstrated that U.S. EPA had run the Integrated Uptake/Biokinetic Model in an inappropriate manner and determined that, even if one were to use very conservative assumptions, the model demonstrated that 1,000 cleanup level was protective of human health and the

environment under the standards EPA had considered acceptable in Appendix B.

- The offers included performing an environmental assessment of the area, including a blood lead study and environmental sampling from which one could potentially determine whether the soil at the site caused an adverse health effect. If the study demonstrated that health effects were occurring, the parties to the offer agreed that they would clean down to the 500 ppm standard. If the study demonstrated that no health effects were evident, the parties nevertheless offered to clean to the 1,000 ppm level as a compromise, even though a higher level may have been warranted.

(Supp. AR No. 2).

U.S. EPA rejected the offers in September, 1991. (Supp. AR No. 3) (attached as Exhibit F). U.S. EPA did not deny that correct use of the model would have resulted in the cleanup levels suggested by Defendants. Instead, U.S. EPA now claimed that it had only run the model because of a public comment and that, despite specific language in the Record of Decision and the Responsiveness Summary to the contrary, it "did not rely on use of the Biokinetic model in its selection of cleanup standards at the NL Site." It then proceeded, without elaboration and without comment regarding Defendants' critique of the Record of Decision, to repeat the so called "site-specific" criteria it had previously used and to reaffirm its dependence on a guideline which had not been subjected to rulemaking procedures. Id.

(e) Section 106(a) Administrative Compliance Order and Complaint.

On November 27, 1990, U.S. EPA issued the Order to Defendants and others demanding that they perform the cleanup specified in the Record of Decision. (Supp. AR No. 4). Shortly before the January deadline set by U.S. EPA for committing to implement the Order, Defendants reaffirmed to U.S. EPA that they were willing to proceed will all aspects of the order except for the residential cleanup. Recognizing that U.S. EPA would initiate an action in any event and that implementation of the residential cleanup was not likely to occur until well into the remedial action, Defendants offered to perform all tasks except cleanup of residential property with lead levels less than 1,000 ppm. In the meantime, U.S. EPA could initiate its suit and attempt to force the parties to perform additional residential cleanup, and no delay in performance of the cleanup would occur whatever the outcome of the suit. (Supp. AR No. 9). For reasons never communicated to Defendants, U.S. EPA would not permit the parties to begin work unless they agreed in advance to perform every detail of the residential cleanup. On July 31, 1991, the United States initiated this action on behalf of U.S. EPA.

(f) The Madison County Exposure Study.

After issuing its Record of Decision, U.S. EPA's sister agency, the Agency for Toxic Substances and Disease Registry

("ATSDR")[5], along with the latter's contractor, the Illinois Department of Public Health, conducted the site-specific blood-lead study called for in the Record of Decision, the Madison County Lead Exposure Study (the "Madison County Study"). One of the purposes of this study was to determine the relationship between blood lead and lead in soil and other sources of environmental exposure. (Supp. AR No. 352 at pp. 9-10). Unlike most of the data previously reviewed by U.S. EPA for site remediation purposes, this study was designed to provide information specifically about the effects of lead at Granite City.[6]

The draft study, issued in February 1994, concluded that soil lead had little effect on blood lead levels. (Supp. AR No. 129 at p. 49). The Study concluded that the lead in the soil at the Site is not a health risk to children. The study also concluded that lead in soil was the smallest environmental contributor to elevated child blood lead levels near the site. (Id.) The final study stated that "[e]liminating a variable such as soil that accounted for only 3% of the variance [in blood lead

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[5]ATSDR is required by statute to perform a health assessment for each facility on the National Priorities List. 42 U.S.C. 1604(i)(6)(A) It also may "conduct periodic survey and screening programs to determine relationships between exponents to toxic substances and illness." Section 9604(i)(1)(A)

[6] Although it was clear this study would provide relevant site-specific information, U.S. EPA took the position that the results of this study would not affect its selected remedy. Brad Bradley stated to the press, "We really, at this point, would not use blood-lead data to change the clean-up level." See Safir Ahmed, "Dirty Issue," St. Louis Post-Dispatch, March 2, 1990 (Part of the Exhibit B to the City's First Amended Counterclaim). The Illinois Department of Public Health also commented on the Proposed Plan and concluded that the blood lead study should be used specifically to aid in setting the cleanup level. The City agreed.

levels] may only result in a minimal change in measured blood levels without any clinical significance." (Supp. AR No. 355 at 26).

(g) The Decision Document.

In September 1994, after the City filed a motion for a preliminary injunction, U.S. EPA agreed to meet its commitment to the Court of a year earlier to reopen the record to permit, among other things, the inclusion of the Madison County Exposure Study. In October 1994, U.S. EPA reopened the comment period. In January 1995, the City and the Defendants submitted comments on the health study and on U.S. EPA's 1990 application of the IUBK model. (Supp. AR No. 336). In the meantime, Dr. Bornschein initiated his study of several residences following U.S. EPA's cleanup.

On October 6, 1995, U.S. EPA released the Decision Document/Explanation of Significant Differences ("DD/ESD"). (Supp. AR No. 377). In that document, U.S. EPA changed some portions of the proposed remedy at the site, but continued to adhere to the 500 ppm residential soil cleanup level. The DD/ESD stated that the basis for this decision was set forth in Attachment 4, a document entitled "Statistical Analyses of Data from the Madison County Lead Study and Implications for Remediation of Lead-Contaminated Soil," by Allan H. Marcus, PhD ("the Marcus Report") (attached as Exhibit G).

The DD is noteworthy in the first instance to the extent that it totally departs from the rationale used to justify the original 1990 decision. In the original Record of Decision, the key elements underlying the decision were the 1989 version of the

blood lead model and a blood-lead level standard articulated as no more than 8.5% of the affected population having blood lead levels in excess of 15 ug/dl. In contrast, the 1995 Decision Document depends on a new guidance using a new version of the model and articulates the standard which drives the cleanup level as not more than a 5% probability that a potentially affected individual will have a blood lead level exceeding 10 ug/dl. (Id.) U.S. EPA provides absolutely no rationale for these arbitrary changes. It does not explain why one guidance has been substituted for another. It does not attempt to explain the previous use of the older model and any correlation to its present arbitrary decision. It makes no attempt to explain why the standard which it considered protective in 1990 has been replaced with a different standard. It does not even acknowledge the original record -- it simply substitutes a new rationale.

The Marcus Report, which was not made available for comment to the parties, relies on two "bases" to support selection of the 500 ppm level: a lengthy (58 page) attack on ATSDR's Madison County Exposure Study, which does not discuss any particular cleanup level, and a brief (6 page) discussion of the application of the new IEUBK model, which alone underlies the selection of the remedy!

**ARGUMENT**

U.S. EPA is now taking further action implementing its residential cleanup in Granite City. Rather than first addressing the pile, it is conducting unnecessary or premature activities in residential areas. The City has no alternative but

to request this Court to stop U.S. EPA's activities by issuing a preliminary injunction.[7]

Preliminary relief such as a temporary restraining order or a preliminary injunction preserves the subject of a controversy in its then-existing condition and maintains the status quo pending an ultimate resolution of a lawsuit. Missouri-Kansas-Texas R. Co. v. Brotherhood of RY & S.S. Clerks, 188 F.2d 302 (7th Cir. 1951). A Court is required to consider four factors in deciding whether to grant such preliminary relief: (1) whether the party requesting the relief has a reasonable likelihood of success on the merits; (2) whether the party will have an adequate remedy at law or will be irreparably harmed if the relief is not granted;[8] (3) whether the threatened injury to the party requesting relief outweighs the potential harm to the other litigants; and (4) whether the requested relief will serve the public interest. Atari, Inc. v. North American Phillips Consumer Electronics Corp., 672 F.2d 607, 613 (7th Cir.), cert. denied, 459 U.S. 880 (1982). Each factor favors entry of preliminary relief in the present case.

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[7] The Court's jurisdiction to hear the City's grievances was briefed and argued in 1994. Under the principles set forth in United States v. Princeton Gamma-Tech, 31 F.3d 138 (3rd Cir. 1994), the Court ruled that it had jurisdiction because EPA had initiated an enforcement and cost-recovery action and the City's interests were affected.

[8] Some cases combine this factor with the requirement that the party seeking the injunction have "no adequate remedy at law." See Roland Machinery Company v. Dresser Industries, Inc., 749 F.2d 380, 383 (7th Cir. 1984). As the discussion below in Section 2 and in the attached affidavits demonstrates, the City is in serious danger of suffering irreparable harm; no amount of damages (even if damages were available) would cure the potential devastation EPA's proposed remedy threatens to bring to the City.

I. Because U.S. EPA's decision process is arbitrary, capricious and illegal, and because the U.S. EPA is acting pursuant to an unconstitutional statue, the City has a reasonable chance of success on the merits.

The threshold for demonstrating that a movant has a reasonable likelihood of succeeding on the merits is low: a party meets this first criterion for a preliminary injunction so long as its chances of succeeding at trial are "better than negligible." Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 387 (7th Cir. 1984) (citations omitted). As the discussion below demonstrates, the City's chances for success on the merits of this case are far better than negligible. Due to the egregiousness of U.S. EPA's violation of the applicable law and the arbitrary and capricious nature of its actions, and due to the fact that the statute under which U.S. EPA is acting is unconstitutional, success is highly probable.[9]

A. The 1990 Record Of Decision Does Not Support U.S. EPA's Selection Of Remedy.

This Court is authorized to set aside the remedial action selected by U.S. EPA if the Agency's decision was arbitrary and capricious or not otherwise in accordance with the law. 42 U.S.C. 9613(j)(2). The Court's analysis of the validity of U.S. EPA's decision should be based on the administrative record that underlies that decision, supplemented as permitted by law. 42 U.S.C. 9613(j)(1). An administrative decision is arbitrary and

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[9] Once this initial criterion has been met, the court may then evaluate just how likely the movant's chances for success are, because "the more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more it need weigh in his favor." Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d at 387.

capricious if it lacks a "rational connection between the facts found and the choice made." Motor Vehicles Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto Ins. Co, 463 U.S. 29, 43 (1983), quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962). It is illegal if it treats a policy or guidance as a rule. McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317 (D.C. Cir. 1988). The bases provided in the ROD and the subsequent DD for the standard selected by U.S. EPA reveal that the U.S. EPA's selected remedy suffers from just such fatal flaws.

U.S. EPA's original choice of a 500 ppm residential soil cleanup was purportedly justified on three bases set forth in Appendix B to the ROD: (a) an Agency policy recommending 500-1000 ppm levels for lead, (b) the nascent IUBK model, and (c) a series of factors enumerated below, supplemented with a few general studies regarding lead.

The last set of "factors" does not support the decision: even if all of them were assumed to be true, they do not, taken individually or together, logically lead to a 500 ppm cleanup standard, or indeed to any numerical clean-up standard at all. These "factors" are:

- No suitable basis exists for performing a risk assessment since the lead reference dose level has been withdrawn by the Centers for Disease Control.
- The soil has elevated levels of lead.
- Smelter operations result in the emission of small particles containing lead.
- The small particles, once deposited in soil, will cling to

objects and can be transferred to the indoor environment.

- The particles have high bioavailability.[10]
- Low exposures to lead may have significant health effects.
- Pica children (those with a tendency to excessively mouth objects) are at risk.
- There are children in the smelter neighborhood.[11]
- The particles may act in a synergistic manner with other toxic substances.

As a matter of general logic, statements about Site conditions (e.g. there is lead in the Site soil, there are children in the smelter neighborhood), general assertions about the nature of lead (smelter operations result in the emission of small particles containing lead;[12] small particles in soil cling to objects, pica children are at a greater risk of ingesting lead than other children, low exposure to lead may have

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[10]This and the two preceding factors argue that bioavailability should be considered. The guidance on which U.S. EPA expressly relies for choosing the range of 500 to 1,000 ppm specifically states that bioavailability should not be considered in choosing a clean-up level. (AR No. 95) U.S. EPA has further compounded the arbitrary and capricious nature of its remedy selection by not following the very guidance it claimed to be applying. See Kent County, Delaware Levy Court v. U.S. EPA, 963 F.2d 391 (D.C. Cir. 1992); Anne Arundel County, Maryland v. U.S. EPA, 963 F.2d 412 (D.C. Cir. 1992) (U.S. EPA's failure to follow its own policy/guidance resulted in arbitrary and capricious agency decision).

[11]The guidance states that residential soils with lead concentration from 500 to 1,000 ppm should be protective of human health and the environment. (Id.) The fact that the area is residential indicates only that the guidance should be consulted and further that the agency should determine what level may be appropriate under site-specific circumstances. To claim a specific level within the range set forth in the guidance is appropriate because the area is residential is illogical.

[12]U.S. EPA ignores the fact the smelter has not operated for years.

significant health effects), and finally, a statement that there is an absence of a reliable basis on which to perform a risk assessment (due to the withdrawal of the lead reference dose by the Centers for Disease Control) do not, taken individually or jointly, provide or even suggest an appropriate clean-up level for the Site. Rather than presenting a link between these factual assertions and any numerical clean-up standard, U.S. EPA simply presented these facts and then concluded that 500 ppm was the appropriate standard for the Site.

The logical flaw inherent in U.S. EPA's loose methodology is also a legal flaw. In the Matter of Bell Petroleum Services, Inc., 3 F.3d 889 (5th Cir. 1993), demonstrates that U.S. EPA may not choose whatever remedial action it likes and provide as "support" various factors evidencing the existence of a problem generally. In that case, U.S. EPA sought to recover response costs under CERCLA for an alternative water supply system it installed to remedy groundwater contamination at a Superfund site. Although the administrative record documented that the water was indeed contaminated, the court held that U.S. EPA's decision to provide the system was arbitrary and capricious because the record did not establish the necessity of an alternative water supply to remedy the problem. Id. at 906. Similarly, in this matter, various assertions regarding lead at the Site and lead generally do not establish the adequacy or necessity of a 500 ppm standard.

The lead studies mentioned by the Agency similarly fail to provide a link between characterization of the Site or characterization of lead hazards generally and the necessity of a

500 ppm standard at this particular Site. Appendix B noted that a Canadian agency recommended a 500 to 1,000 ppm range for soil lead cleanups and that other regions of U.S. EPA have decided in particular instances that cleanup to 200 to 500 may be warranted. It did not specify why the decisions reached at these other sites were applicable to the Granite City site. The agency also referred to research documents relating to soil lead studies authored by Mielke, Milar and Mushak (who warned of lead hazards related to lead in household dust above 1,000 ppm but apparently did not discuss or address a 500 ppm standard for soil) and Shellshear, as well as a personal, ex parte communication with Mielke. It did not explain how the documents were considered to reach its decision, nor did it appear to consider other studies which disagreed, some vehemently, with the named studies.[13]

As with the general assertions regarding the existence of lead contamination at the Site, these generic studies provide no link between the hazards presented by lead generally and the necessity of a specific clean-up standard at this particular Site. Once again the "rational connection" between facts and the decision that is necessary to prevent an agency decision from being arbitrary and capricious is missing. Moreover, as

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[13] Far from providing the basis for Mielke's conclusion that 500 ppm was an appropriate standard for the Site, the administrative record appears to provide no documentation whatever of the ex parte communication in which Mielke apparently made this assertion. The record does document a telephone conversation between Louise Fabinski, liaison for the Agency for Toxic Substances and Disease Registry (ATSDR) and J. Milton Clark of Region V in which Fabinski stated that ATSDR did not object to a 500 ppm standard at the Site. This conversation took place March 30, 1990 (the day the ROD was issued), further evidencing that EPA chose a standard for this Site first and then sought support for it later.

demonstrated by the discussion below (infra at 30) of the D.C. Circuit Court of Appeal's decision in Tex Tin Corp. v. EPA, 992 F.2d 353 (D.C. Cir. 1993), an agency cannot rely on generic studies to support a determination, particularly when there is conflicting and complex site-specific data as here.

U.S. EPA's reliance on the other "bases" provides no more logical or rational support than the factors described above. Apparently aware even at the outset that its misapplication and misuse of the IUBK model would lead to difficulties, U.S. EPA itself later recanted reliance on the model, stating that it did "not rely on use of the ... model in its selection of cleanup standards..." (Supp. AR No. 3, September 11, 1990 letter from Norman R. Niedergang of U.S. EPA.) The Agency's abandonment of any reliance on the model is further evidenced by its reliance on an entirely new version of the model with entirely new factors in the 1995 Decision Document.[14]

The other "bases" failing, U.S. EPA is left with its reliance upon its "Interim Guidance on Establishing Soil Lead Cleanup Levels at Superfund Sites." This document fails to

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[14] The IUBK model was a new and relatively untried tool at the time U.S. EPA employed it for the Site, and the Agency's misapplication of it resulted in its reaching an inaccurate conclusion. (See Defendants' responses to the Special Notice Letter, documenting that correct application of the model at the Site resulted in a clean-up standard of 1,000 ppm (Supp. AR No. 2). Therefore, even if the Agency had relied on the model, its misapplication of it would have rendered the EPA's clean-up selection arbitrary and capricious. See Chemical Manufacturers Association v. Environmental Protection Agency, 28 F.3d 1259 (D.C. Cir. 1994) (EPA's faulty application of a model resulted in an arbitrary and capricious agency action). The Agency itself has indicated its awareness of the flaws in its initial application of the IUBK model through its reliance on a different version of the model in the 1995 Decision Document.

provide valid support for the standard for three reasons: (1) reliance upon a generic policy is arbitrary and capricious when there is complex and conflicting data specific to the matter at hand; (2) EPA's use of the guidance in this matter has essentially rendered this policy an illegal rule; and (3) the guidance itself provided a range of 500 to 1,000 ppm as appropriate cleanup levels.

In Tex Tin Corp. v. EPA, 992 F.2d at 354-55, the U.S. EPA sought to defend the listing of a site on the National Priorities List based on a number of generic, non-site specific studies and conclusory observations. The court held that the Agency's reliance on the generic studies, rather than site-specific, detailed scientific evidence regarding conditions at the site, was arbitrary and capricious. Similarly, in this case, U.S. EPA has chosen to rely on a non-site specific guidance document when it had the options of using NL Industries' site-specific documentation or developing its own studies in order to determine an appropriate cleanup standard for the site. Under these circumstances, U.S. EPA's nearly random selection of 500 ppm--as opposed to any other number in the range of the Guidance, or for that matter, any other number at all--is arbitrary and capricious.

It is also well-established that where an agency treats a policy or guidance statement as conclusively disposing of certain issues and is unwilling to consider other alternatives outside of the policy, the agency has crossed the line between policy development (which does not require the agency to follow statutory procedures) and rulemaking (which does require the

agency to follow statutory procedures). Where an agency treats a policy as a rule, its action has violated the Administrative Procedure Act and its action should be set aside. McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317 (D.C. Cir. 1988).

In McLouth Steel, the court held that U.S. EPA had essentially promulgated a rule without the requisite notice and comment in the Agency's application of a guidance document for determining whether to delist a waste stream under RCRA. Because U.S. EPA had applied the guidance document inflexibly, demonstrating little or no willingness to examine the propositions underlying the guidance or to consider factors not included in it, the court concluded that the policy was in effect dispositive of a given issue and so was a de facto rule. As such, the Agency had acted outside its scope of authority in promulgating a rule without following the required procedures set forth in the Administrative Procedure Act. Id. at 1322.

Similarly, U.S. EPA applied the Interim Guidance like a rule in the present case. It refused to consider cleanup levels outside of the range provided in the Guidance, even when confronted with a risk assessment which suggested a level outside the range may be appropriate. Because the Guidance is not a legally promulgated rule, U.S. EPA is not entitled to rely upon it alone for its selection of a site remedy. It is a well-established precept of administrative law that when an agency applies a policy or guidance document to a particular situation, it must be prepared to support the policy just as if the policy had never been issued. Pacific Gas & Electric Co. v. Federal Power Commission, 506 F.2d 33 (D.C. Cir. 1974); Public Citizen v.

Nuclear Regulatory Commission, 901 F.2d 147 (D.C. Cir.), cert. denied, Nuclear Management & Resources Council, Inc. v. Public Citizen, 498 U.S. 992 (1990); Bechtel v. FCC, 957 F.2d 873 (D.C. Cir.), cert. denied, Galaxy Communications, Inc. v. FCC, 506 U.S. 816 (1992) (all noting that an agency may not rely upon general guidance or policy statements alone to support a decision in an individual specific factual situation). Most tellingly, the guidance itself does not favor any particular level in its 500 to 1,000 ppm range. Despite the fact the guidance provides for a 1,000 ppm level, U.S. EPA acts as if the guidance set 500 ppm as the appropriate level. This is not surprising. Because the other factors relied upon by U.S. EPA were all deficient (see discussion above), U.S. EPA was left with only the Guidance as support for its decision. U.S. EPA lacks sufficient support for its selection of a clean-up remedy and that selection should be set aside.

### B. U.S. EPA's Issuance of the DD Did Not Cure the Flaws in the Original Record

U.S. EPA's attempts to remedy the flaws of its original record through the issuance of the DD/ESD are unavailing. U.S. EPA has made the same mistakes in its second attempt to support its conclusions as it did in the first pass: it has based its remedy selection on a document which was not available for comment (the Marcus Report), it has used a policy/guidance document (including an updated version of the IUBK) as a rule without complying with the notice and comment requirements. Finally, its post-hoc justifications cannot support a decision. For these reasons, U.S. EPA's remedy selection remains arbitrary,

capricious and unlawful.

1. U.S. EPA Failed to Provide the Required Opportunity for Comment on Its Selection of a Remedy

Even if U.S. EPA were entitled to rely on new theories to defend its original selection of the 500 ppm standard, the procedure it has employed in developing that new data is in direct violation of applicable law. The document U.S. EPA cited in the DD as forming the basis for the selection of the 500 ppm remedy (the Marcus Report) was not made available for public comment. Rather, U.S. EPA noted its reliance on this lengthy report for the first time in the DD -- after the close of the comment period. The Agency's failure to circulate the report that formed the basis for its remedy selection, like U.S. EPA's earlier notice requirement violations, was in direct contravention of CERCLA, the principles of due process and the general principles governing administrative actions.

CERCLA Section 113(k), 42 U.S.C. 9613(k), requires public participation in the development of the administrative record on which U.S. EPA will base its selection of a remedy. The Marcus Report, forming the linchpin of U.S. EPA's new support for its selection of the 500 ppm standard, should have been made available to the City, the public, as well as the PRPs, so that they had notice of this "basis" and an opportunity to submit comments regarding it into the record. By depriving the City of this opportunity, U.S. EPA has clearly violated CERCLA. The Agency also violated its own guidance requiring public

participation during the response selection process.[15]

Moreover, U.S. EPA's failure to circulate the core support for its remedy selection violates the City's right to due process, just as its failure to provide notice and an opportunity to comment to the PRPs during the first round of its remedy selection did. See United States v. Rohm & Haas Co., 669 F. Supp. 672 (D.N.J. 1987) (CERCLA requires adequate opportunity to comment). See also Asarco v. U.S. EPA, 616 F.2d 1153 (9th Cir. 1980) (consultant's report not provided to other parties prior to the issuance of final order, but included in the record as a basis for the decision, was held prejudicial and in violation of agency principles).

General principles governing official agency actions require that when an agency relies heavily upon a particular technical document in its decision-making process, it must circulate that document for public comment. See Idaho Farm Bureau v. Babbit, 58 F.3d 1392 (9th Cir. 1995) (failure of agency during rulemaking to make document or report available before the end of the public comment period constituted procedural error when agency had heavily relied on such report). Because the Marcus Report undeniably forms the core of support for U.S. EPA's remedy selection, the Agency's failure to cite to or circulate that report until after the close of the comment period constitutes a violation of CERCLA, due process principles, and general

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[15] "Final Guidance on Administrative Records for Selecting CERCLA Response Actions," (OSWER Doc. No. 9833.34-1) provides at page 4, "Participation by interested persons will ensure that the lead agency has considered the concerns of the public, including PRPs, during the response selection process."

principles of administrative law.

2. The DD/ESD Does Not Provide Valid Legal or Technical Support for the 500 ppm Level

The Marcus Report consists of two major parts: an attack on the Madison County Exposure Study and a discussion regarding the use of the new model in a backwards manner with default values. Taken individually or together these two elements do not provide support for the 500 ppm level.

The vast majority of the Marcus Report simply attacks the conclusions of the Madison County Exposure Study. Apparently, U.S. EPA is very concerned that the conclusions of the report do not support its remedy. Nevertheless, U.S. EPA's differences with the study conducted by its sister agency do not address the choice of a particular cleanup level. In In re Bell Petroleum Services, Inc., 3 F.3d 889 (5th Cir. 1993), U.S. EPA attempted to support its decision to provide an alternative water supply system by citing to data documenting that water at a Superfund Site was contaminated. The Court held against the agency, finding that the agency was required to show that the system was necessary to solve the problem. Here, mere differences with the study report do not demonstrate why a particular cleanup level is appropriate.

The remainder of the Marcus Report reflects the analysis conducted when a new version of the IUBK model (now called the "IEUBK" model) is run backwards using default values. The outcome of this use of the model, according to U.S. EPA, supports its selection of a 500 ppm level at the site. Actually, it does no such thing.

To begin with, every time a model is run backwards using default values, the same result will occur.[16] Rather than using the model as an instrument to determine which level is appropriate for Granite City based on site-specific data, U.S. EPA has devised and then employed the model in a way that will ensure the same result in every case. As the discussion in Section I(A)(1) above notes, when an Agency applies a guidance or policy document in an inflexible manner, refusing to consider case-specific factors, the agency is employing that guidance as a rule. McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317. Rules created without the benefit of notice and comment procedures are, of course, illegal. Id.

Moreover, U.S. EPA's use of a model in the manner employed in the present case offends basic principles of administrative law. The model, which has never been subjected to rulemaking, has become the only rationale underlying U.S. EPA's choice of a soil remedy, not only in the present case, but also at several other sites. This arbitrary behavior was expressly condemned in the McLouth Steel Products case, 838 F.2d at 1322. In that case, U.S. EPA consistently relied on a model which had not been subjected to rulemaking procedures to decide whether to "delist" specific wastes from hazardous waste listings. The court noted that the Agency's reliance on the delisting model had become sufficiently extensive and consistent that the model had been

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[16]The Marcus Report (pp. 60-62) alarmingly argues that site specific data should be ignored because the model does not seem to work when it is used! The author also expressly admits that the model is not predictive in lead paint-related cases (p. 64), the very circumstance present in Granite City.

used as a rule. The exact circumstances have arisen in lead cleanups. The Agency in its Chicago office now justifies cleanups at site after site with total reliance on the model. This practice is illegal. As the D.C. Circuit noted in Tex Tin, when there is detailed, conflicting site-specific data available, U.S. EPA cannot support actions taken regarding a site with generic policy, guidance documents, or a model; it must consider and apply site-specific data. 992 F.2d at 354-355.

3. U.S. EPA's Inconsistencies in Justifying its Choice of Remedy Represent Post-Hoc Rationalization to Which This Court Need Pay No Deference

It is a well-settled principle of administrative law that an agency's order can only be upheld on the same basis given by the agency in rendering its original decision; the agency may not provide post-hoc justifications which were not relied on in reaching a determination. Local 814 Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen v. N.L.R.B., 546 F.2d 989, 992 (D.C. Cir. 1976), cert. denied, 434 U.S. 818 (1977) (citing SEC v. Chenery Corp., 332 U.S. 194 (1947)). Where there are no findings and no analysis justifying "the choice between two vastly different remedies with vastly different consequences," the agency cannot cure its error by creating support for a decision after it has been made. Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 168-69 (1962)(citing Chenery, 332 U.S. at 196).

In U.S. v. Amtreco, Inc., 806 F. Supp. 1004 (M.D. Ga. 1992), defendants sought to supplement the administrative record in order to challenge U.S. EPA's remedy selection in a CERCLA action. Id. at 1005. In ruling on the defendant's motion to add

certain documents for review, the court stated, "First, many of the documents were created after the selection was made ... Post-decisional information is not relevant to a judicial review of any agency decision." Id. at 1007 (citations omitted) (emphasis in original). This rule applies regardless of whether it is an agency or an interested party that seeks to rely on post-hoc bases for a decision. Wisconsin Electric Power Company v. Costle, 715 F.2d 323, 326-327 (7th Cir. 1983); See also, Tex Tin Corp. v. U.S. E.P.A., 992 F.2d 353, 355 (D.C. Cir. 1993) (holding that U.S. EPA may not defend its decision to place a site on the National Priorities List on a hypothesis not advanced in its original decision, because "it is too late for the Agency to base its listing on a new theory").

The decision-making process associated with the Site presents a textbook example of post-hoc rationalization. As recounted in the Statement of Facts by reference to the administrative record, U.S. EPA chose the 500 ppm remedy in late 1989 without stating any justification except reference to its own guidance (despite the fact the guidance itself stated a range of 500-1,000 ppm). Since then, the agency has:

- Claimed in a January 10, 1990 document that the 500 ppm level was based on various articles and documents, and then recanted its reliance in the March 30, 1990 Record of Decision;
- Claimed in the Record of Decision that its decision was based in part on the IUBK model, and then recanted reliance on the model in September 1990;
- Claimed in the Record of Decision that the risk

associated with a mean blood level of 8.37 ug/dl and only 8.5% of the population above 15 ug/dl was acceptable, and then changed the standard in the Decision Document to no greater than 5% above 10 ug/dl without explanation;

- Gave no rationale whatsoever for use of a revised model and a new health standard;
- Published its critique of the Madison County Exposure Study after the comment period had been closed for eight months; and,
- Claimed in its critique that site data should be discounted because it did not fit the IEUBK model, and refused to consider the possibility that the model should be tweaked because it did not fit the site data.

Each step in the process begs for a finding that U.S. EPA's actions are best characterized as attempts to justify a preordained conclusion rather than activities necessary to produce a rational result.

The ROD, the DD and their underlying "support" provide an ever-changing rationale for U.S. EPA's selection of the 500 ppm level. Such post-hoc justifications should not be tolerated and are certainly not entitled to any deference from this Court.

### C. CERCLA Exceeds the Authority Granted to Congress Under the Commerce Clause Because the Regulated Subject Matter is not an Economic Activity that Substantially Affects Interstate Commerce.

As the discussion above demonstrates, U.S. EPA has acted arbitrarily and capriciously and has violated applicable law. However, even if U.S. EPA had not engaged in such egregious

conduct, it still would be without authority to proceed with the clean-up since the statute under which U.S. EPA is purporting to act -- CERCLA -- is unconstitutional.

On May 20, 1996, a federal district court ruled that CERCLA exceeded the authority of Congress under the Commerce Clause, U.S. Const., Art. I, §8, cl. 3, to regulate local activities. United States v. Olin Corp., No. 95-0526, 1996 U.S. Dist. LEXIS 6996 (S.D. Ala., May 20, 1996) (attached as Exhibit H).[17] The court relied on a recent Supreme Court case discussing Congressional power to regulate the possession of firearms in school neighborhoods. United States v. Lopez, 115 S.Ct. 1624 (1995).

As discussed in Lopez, Congressional power to legislate under the guise of the Commerce Clause has been generally unconstrained in the post-New Deal era. Nevertheless, the Supreme Court chose Lopez as a vehicle to discuss under what circumstances activities tangentially connected to commerce may be regulated. In discussing various gradations of Commerce Clause authority, the court noted that it had never ruled definitively whether it is enough for the regulated activity to "affect" interstate commerce or whether it must "substantially affect" interstate commerce. In Lopez the Court chose the latter. Id. at 1630.

A statute regulating a local activity substantially affects

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[17] The Olin decision also ruled that CERCLA did not apply retroactively to render parties liable for conduct that preceded December 12, 1980, the day CERCLA was enacted. This motion seeks to stop U.S. EPA from proceeding with its remedy, not to impose liability on any party. Thus, the retroactivity portion of the case will not be discussed in this procedural posture.

interstate commerce if (1) the regulated activity arises out of or is connected with commercial transactions which, viewed in the aggregate, substantially affect interstate commerce, id., or (2) the statute contains a jurisdictional element which ensures through case-by-case inquiry that the activity in question affects interstate commerce, id. at 1631. In Olin, the district court noted regarding the requirement of an effect on interstate commerce that "CERCLA generally represents an example of the kind of national police power rejected by Lopez." Olin, 1996 U.S. Dist. LEXIS at * 108. In the present case it is difficult to imagine how the Site remediation has any effect on interstate commerce. As in Olin, there is contamination in and around the inoperative smelter site in Granite City. The company that operated the smelter does not even own the property, and its customers have not transacted business with it for over 13 years. Site documentation establishes that the impact of the historical Site activities does not extend more than a mile and certainly does not cross state lines.

Regarding the requirement of a jurisdictional element, nothing in the statute provides for a case-by-case inquiry into whether the transaction at issue affects interstate commerce. For instance, in Lopez the Court noted that a law rendering it a crime for a felon to receive, possess, or transport arms in commerce or affecting commerce was appropriate because of the express jurisdictional limitation. Lopez at 1631. Because CERCLA did not limit its application to matters which expressly affected interstate commerce, it was considered deficient. Olin, id. at *108-109.

CERCLA attempts to regulate what is best characterized as a local phenomenon long regulated under state police powers. As such, it is an unlawful exercise of Congressional authority.

D. The City Has Met Its Burden of Reasonable Probability of Success on the Merits

As noted initially, the City's burden in demonstrating a reasonable probability of success on the merits is not great. The evidence and legal arguments presented above conclusively demonstrate that it will succeed on the merits. U.S. EPA chose a remedy in the first instance without support and has spent over six years attempting to rationalize it. Each step has been arbitrary, capricious, and illegal. Moreover, U.S. EPA is acting pursuant to an unconstitutional law. The first prong of the requirements for preliminary relief has been met.

**II. The City will suffer irreparable harm if the cleanup proceeds.**

By its very nature, environmental injury can rarely be remedied by money damages and is often irreparable. Sierra Club v. Cargill, 732 F.Supp. 1095, 1101 (D. Colo. 1990). When a government agency threatens to undertake an action that is potentially injurious to the affected community without following the applicable statutory and procedural requirements, injunctive relief is the appropriate remedy. In United States v. 27.09 Acres of Land, 760 F. Supp. 345 (S.D.N.Y. 1991), the U.S. Postal Service sought to commence construction of a new postal facility without complying with the relevant statutory requirements for public input and reasoned consideration of environmental impacts (pursuant to the National Environmental Policy Act). The

affected community moved for a preliminary injunction to halt construction of the facility, arguing that construction would result in injury connected to increased traffic and potential water contamination from runoff. Based on this threatened harm, the court enjoined construction of the facility, noting that "once [construction is] begun, . . . [i]t cannot be undone. That work may well result in actual environmental harm, which similarly cannot be undone." Id. at 354.

As documented in the accompanying affidavits and attachments, the highly invasive clean-up U.S. EPA plans to undertake will result in damage to the City. The Bornschein study documents the environmental impact, the Hewings affidavit points to economic destruction and the Baudendistel affidavit provides an indication of the impact on the City's infrastructure. Preventing such irreversible detriment is an end for which injunctive relief is particularly appropriate.

## III. Potential harm in this case falls squarely on the City, not on the U.S. EPA.

If the cleanup proceeds in the manner contemplated by U.S. EPA, the City will be harmed. If the process is checked now and the U.S. EPA is forced to proceed with a rational cleanup in an orderly manner, the goals of the City in securing a future for its citizens and their children will be realized. The United States has nothing to lose whatsoever however this matter proceeds. The balancing of harm favors the City.

Although U.S. EPA suffers no injury if a preliminary injunction is issued, it may claim that its governmental interest in selecting and implementing a remedial action, no matter how

flawed its selection process may be, precludes relief. Such bureaucratic "the-dam-is-breaking" arguments, however, pale in comparison to "the difficulty of stopping a bureaucratic steam roller, once started, ... a perfectly proper factor for a district court to take into account" on a motion for a preliminary injunction. Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989). Balancing U.S. EPA's interest in pursuing any course of action it chooses, no matter how procedurally and substantively flawed, against the City's interest in maintaining its environmental and economic well-being clearly favors issuance of the preliminary injunction.

## IV. Requiring due process and refocusing the cleanup on legitimate concerns are both in the public interest.

Where injunctive relief may affect interests beyond those of the parties to the suit, a court should consider how the requested relief might affect the public interest. Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325 (7th Cir. 1986). If the interests of one of the parties coincides with the public interest, the interest of that party should be given greater weight. Here the City's interest more than coincides with the public; the City, in representing the citizens of the affected community, speaks for the public. The potential harm to the City which would result if no injunction were to be issued should be weighed all the more heavily.

In the same vein, damage to a community and its environment, including cultural, social and economic costs, are all appropriate considerations in determining whether to enjoin government action affecting the environment. See Northern

Cheyenne Tribe v. Hodel, 851 F.2d 1152 (9th Cir. 1988) (directing the district court to consider these factors when determining whether to enjoin federal coal leases issued in violation of the National Environmental Policy Act).

Moreover, "the public" (in a broader sense of the term) would suffer if U.S. EPA implements detrimental Superfund "remedies" without sufficient scientific and legal support. The public interest favors rational governmental action based on generally accepted scientific principles. It should favor an atmosphere in which cities grow and thrive, not one in which arbitrary federal action imperils local welfare. The public interest prong dictates preliminary relief.

**CONCLUSION**

For the reasons set forth above, the City of Granite City respectively request that the Court enter a temporary restraining order and a preliminary injunction preventing U.S. EPA from proceeding with the residential cleanup in Granite City, Illinois.

Respectfully submitted,

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